

1 RICHARD D. CAMPBELL
CAMPBELL & BISSELL, PLLC
2 416 Symons Building
7 South Howard Street
3 Spokane, WA 99201
Tel: (509) 455-7100
4 Fax: (509) 455-7111

5 BRIDGET W. LEFEVER
BERG, LILLY & TOLLEFSEN, P.C.
6 One West Main Street
Bozeman, Montana 59715-4642
7 Tel: (406) 587-3181
Fax: (406) 587-3240
8 Attorneys for Plaintiff
9

10 MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

11 W CONSTRUCTION, LLC,

12 Plaintiff,

13 vs.

14 KEITH D. WARING, CITY OF
15 BELGRADE, and THOMAS, DEAN &
HOSKINS, INC.,

16 Defendants.
17

)
) Dept. No.
) Cause No.

18 **COMPLAINT**

19 Plaintiff W Construction, LLC alleges as follows:

20 **PARTIES, JURISDICTION & VENUE**

21 1. W Construction is a Montana Limited Liability Company in good standing
22 with the Montana Secretary of State. W Construction has done all things required of it
23 and met all conditions precedent to maintain this lawsuit. W Construction's principle
place of business is in Gallatin County.

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25

CB | LAWYERS

CAMPBELL & BISSELL | PLLC
416 South Howard Street, Suite 416
Spokane, WA 99201
509.455.7100 Phone
509.455.7111 Fax

2. Defendant Keith D. Waring is a licensed engineer and at all times material practicing the profession of engineering in Gallatin County.

3. Defendant City of Belgrade is a Montana political subdivision situated in Gallatin County, Montana and is amenable to suit.

4. Defendant Thomas, Dean & Hoskins, Inc. ("TD&H") is a Montana Corporation doing business in Gallatin County.

5. The causes of action alleged herein took place in Gallatin County and arose out of conduct and a written contract performed in Gallatin County.

6. Jurisdiction and venue are proper with this Court. Rule 4, M.R.Civ.P. and § 25-2-121, M.C.A. and § 25-2-122, M.C.A.

FACTS COMMON TO ALL CAUSES OF ACTION

7. On or about April 26, 2010, the City advertised for bids for the project known as Schedule 1 North Side 4" Water Main Replacement for Belgrade – Water, Sewer and Street Improvements Schedule 2 – North Side 4" Water Main Replacement for Belgrade – Alley – Water, Sewer and Street Improvements, Belgrade Montana ("Project").

8. The City hired TD&H to design the Project, assist with the bidding of the Project, and administer the contract. Waring was the project engineer.

9. W Construction submitted a bid to perform the work as set forth in the bid documents. The bid opening for the Project was on May 19, 2010. W Construction submitted the low responsive, responsible bid for the Project.

10. On June 14, 2010, the City awarded the Project to W Construction and the parties executed a written contract on the same day.

1 11. On June 29, 2010, the City issued W Construction a Notice to Proceed.

2 12. W Construction performed the contract as required under the contract
3 documents. During the course of construction, W Construction encountered events which
4 through no fault of its own increased its costs of performance. W Construction submitted
5 claims to TD&H and the City for recompense. TD&H and the City denied or ignored
6 these claims.

7 13. TD&H initiated the winter shutdown on November 2, 2010, although W
8 Construction was not notified of that decision until November 11, 2010.

9 14. On March 23, 2011, approximately two weeks before W Construction was
10 scheduled to re-commence work, the City sent W Construction and its surety a letter
11 indicating that it was contemplating terminating the contract for default.

12 15. On March 30, 2011, the City suspended W Construction's performance of
13 the contract.

14 16. On April 1, 2011, the parties conferred regarding the contemplated
15 termination. The City informed W Construction that it would inform it regarding the
16 termination by April 12, 2011. The City also informed W Construction that it would
17 extend the project duration for phase one, remove the inspector from the project, and that
18 it would delete the phase two alley work from the contract because it no longer had the
19 funding to pay for that work.

20 17. The City notified W Construction that it terminated the contract for default
21 on May 11, 2011.

22 18. W Construction was prevented from obtaining other work during the
23 suspension period.

- 1 19. TD&H and/or Waring:
- 2 a. Negligently designed the project.
- 3 b. Negligently administered the contract.
- 4 c. Wrongfully recommended to the City that the City withhold moneys earned
- 5 from W Construction.
- 6 d. Refused to certify pay requests/change orders.
- 7 e. Negligently and/or willfully and fraudulently exercised its contract
- 8 interpretation duties.
- 9 f. Negligently and/or willfully and fraudulently delayed decisions.
- 10 g. Unreasonably, negligently and/or willfully and fraudulently exercised
- 11 inspection and approval obligations.
- 12 h. Negligently and/or willfully and unreasonably scheduled and coordinated
- 13 the work.
- 14 i. Negligently and/or willfully and fraudulently delayed inspections.
- 15 j. Actively, negligently and/or willfully and fraudulently interfered with W
- 16 Construction's operations on the Project, including its manner, method and
- 17 means.
- 18 k. Made false representations to the City regarding W Construction.
- 19 l. Made false representations to OSHA.
- 20 m. Caused inefficiencies and an increase in the cost of and cumulative impacts
- 21 to W Construction's work activities by disrupting W Construction's
- 22 performance.
- 23 n. Required excessive testing and chlorination.

- 1 o. Arbitrarily applied safety standards.
- 2 p. Breached the standard of care/duty owed to W Construction.
- 3 20. The City through its own actions or those of its agents:
- 4 a. Withheld important information from W Construction and the other bidders
- 5 prior to contract award.
- 6 b. Failed to make payments when due.
- 7 c. Failed to execute change orders.
- 8 d. Wrongfully refused to pay claims.
- 9 e. Wrongfully refused to grant time extensions to the contract.
- 10 f. Hindered, delayed and otherwise wrongfully interfered with W
- 11 Construction's work plan.
- 12 g. Provided plans and specifications which were neither sufficient nor
- 13 adequate.
- 14 h. Failed to cooperate in good faith with W Construction and breached its
- 15 duty to W Construction to assist W Construction in its performance of the
- 16 contract.
- 17 i. Breached its warranty of the adequacy and suitability of the plans and
- 18 specifications and contract time.
- 19 j. Breached its duty to schedule and coordinate the work.
- 20 k. Breached its duty to perform timely any conditions precedent.
- 21 l. Caused an increase in the costs of and cumulative impacts to W
- 22 Construction's work activities by disrupting W Construction's
- 23 performance.

1 m. Failed to make City staff available after proper notice was given.

2 n. Wrongfully and in bad faith terminated the contract.

3 21. The City's and TD&H's conduct has also caused W Construction damages
4 in the form of key personnel losses, loss of its bonding capacity, impairment of its bank
5 credit, loss of its business reputation, and has otherwise devastated its business all which
6 have caused monetary damages in an amount to be proven at trial.

7
8 **FIRST CAUSE OF ACTION**
(Breach of Contract – vs. City of Belgrade)

9 22. W Construction re-alleges paragraphs 1 - 21 above.

10 23. The City of Belgrade materially breached express and implied obligations
11 contained in its contract with W Construction, including the implied obligation of good
12 faith and fair dealing.

13 24. As a direct and proximate result, W Construction has been damaged in an
14 amount to be proven at trial and has incurred excusable and compensable delays.

15 25. As an alternate remedy, W Construction seeks recession of the contract and
16 recovery in quantum meruit on an implied in fact contract for the reasonable value of
17 services rendered.

18 **SECOND CAUSE OF ACTION**
(Negligent Misrepresentation – vs. TD&H and Waring)

19 26. W Construction re-alleges paragraphs 1-25 above.

20 27. TD&H and Waring owed W Construction a duty to supply true and correct
21 information for the Project.
22
23

1 28. TD&H and Waring supplied false information in the course of its business
2 for the Project as set forth in paragraphs 19 and 20 and more particularly TD&H and
3 Waring supplied the following false information regarding:

- 4 a. Sequencing of utility work to be performed in advance of W Construction;
- 5 b. W Construction's ability to use asphalt millings in backfill material;
- 6 c. The vertical and horizontal alignments of the pipe and roadways;
- 7 d. The valve box detail;
- 8 e. The size and location of water and sewer services;
- 9 f. The surveys;
- 10 g. W Construction's ability to meet the schedule given the design errors and
11 limitations imposed upon it;
- 12 h. The procedures for payment of stored materials; and
- 13 i. The procedures for testing.

14 29. TD&H and Waring failed to disclose facts that they know may justifiably
15 induce W Construction to act or refrain from acting and were under a duty to W
16 Construction to exercise reasonable care in disclosing the following information:

- 17 a. Survey data relating to asphalt;
- 18 b. Copies of Shannon Holmes' field notes during the project;
- 19 c. The fact that the City of Belgrade had a non-chlorinated water system;
- 20 d. The existence of contaminants in the existing water system;
- 21 e. Their interpretation regarding how many lineal feet of asphalt could be cut;
- 22 f. Their interpretation that W Construction would be required to repair
23 plumbing deficiencies inside existing structures and dwellings; and

1 g. The sewer TV tape.

2 30. TD&H and Waring failed to exercise reasonable care in obtaining or
3 communicating or failing to communicate the information.

4 31. W Construction was one of a limited group of persons for whose benefit
5 and guidance TD&H and Waring intended to supply the information or knew that the
6 recipient intended to supply it of a class for whose benefit the duty was created subject.

7 32. W Construction relied on the information in a transaction that TD&H and
8 Waring knew the information would influence.

9 33. W Construction justifiably relied on the false information which directly
10 and proximately caused W Construction to suffer financial loss.

11 **THIRD CAUSE OF ACTION**
12 **(Negligence – vs. TD&H and Waring)**

13 34. W Construction re-alleges paragraphs 1-33 above.

14 35. TD&H and Waring owed a duty of care to W Construction in the design
15 and administration of the Project.

16 36. TD&H and Waring breached its duty of care.

17 37. As a direct and proximate result, W Construction has suffered damages in
18 an amount to be proven at trial.

19 **FOURTH CAUSE OF ACTION**
20 **(Constructive Fraud (MCA § 28-2-406) – vs. TD&H and Waring)**

21 38. W Construction re-alleges paragraphs 1- 37 above.

22 39. TD&H and Waring breached a duty which, without an actual fraudulent
23 intent, gained an advantage by misleading W Construction to its prejudice.

1 40. TD&H and Waring committed acts or omissions as the law especially
2 declares to be fraudulent, without respect to actual fraud as set forth in paragraphs 19, 20,
3 28, and 29.

4 **FIFTH CAUSE OF ACTION**
5 **(Fraud – vs. TD&H and Waring)**

6 41. W Construction re-alleges paragraphs 1-40 above.

7 42. TD&H and Waring made representations as set forth in paragraphs 19, 20,
8 28, and 29.

9 43. The representations were false and material.

10 44. TD&H and Waring either knew the representations were false or were
11 ignorant as to their truth.

12 45. TD&H and Waring intended that their representations be acted upon by W
13 Construction in the manner reasonably contemplated.

14 46. W Construction was ignorant of the representation's falsities.

15 47. W Construction relied upon the truth of the representations.

16 48. W Construction had a right to rely upon the representations.

17 49. W Construction suffered consequent and proximate injury or damage
18 caused by reliance on the representations for which TD&H and Waring are liable.

19 **SIXTH CAUSE OF ACTION**
20 **(Tortious Interference – vs. TD&H and Waring)**

21 50. W Construction re-alleges paragraphs 1-49 above.

22 51. TD&H and Waring committed acts which were intentional, willful, and
23 calculated to cause damage to W Construction.

52. TD&H's and Waring's acts were done with the unlawful purpose of causing damage or loss to W Construction, without right or justifiable cause.

53. W Construction suffered actual damages and loss as a direct and proximate result.

WHEREFORE, W Construction, LLC, prays for the following relief:

1. For judgment against the City of Belgrade for the City's Breach of Contract in such amount as it proves at trial or alternatively for an order rescinding the contract and for judgment based on quantum meruit;

2. For an order extending the time for performance of the contract for such period as W Construction proves at trial;

3. For judgment against Thomas, Dean & Hoskins, Inc. in such amount as it proves at trial;

4. For Judgment against Keith D. Waring in such amount as it proves at trial;

5. For an award of pre-judgment interest;

6. For an award of attorney fees and costs pursuant to the laws of the state of Montana; and

7. For such other and further relief as this Court deems just and equitable.

DATED this day of September, 2011.

CAMPBELL & BISSELL, PLLC

RICHARD D. CAMPBELL
Attorneys for Plaintiff

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CAMPBELL & BISSELL PLLC

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